FEB 4 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-235

MARCO DE FUNIS, *et al.*, *Petitioners*,

v.

CHARLES ODEGAARD, *et al.*, *Respondents*.

BRIEF OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS AMICUS CURIAE

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OPINIONS BELOW

The opinions of the Supreme Court of Washington are reported at 82 Wn.2d 11, 570 P.2d 1169, and are reprinted as Appendix A to the Jurisdictional Statement or in the Alternative Petition for Certiorari.

JURISDICTION

The jurisdiction of this Court rests on 28 U.S.C. § 1257(3). Certiorari was granted on 19 November 1973.

QUESTIONS PRESENTED

1. Whether the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution requires that state law school admissions be based solely on quantitative predictions as to academic success in the first year of law school, that is, based solely on college grades and Law School Admission Test (LSAT) scores?

2. Is it constitutionally permissible for a state law school to utilize as criteria for selection, among qualified applicants to study law, factors such as the applicant's race, sex, work experience, prior military experience and other background for the purpose of improving the quality of the legal education of all its students and producing graduates better able to communicate effectively with minority groups in our society?

CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the Constitution of the United States provides:

> "... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

CONSENT TO FILING

This Amicus Curiae brief is being filed with the consent of all parties to the proceeding.

INTEREST OF THE AMICUS CURIAE

The Association of American Law Schools consists of 127 of the 152 schools accredited by the American Bar Association. Its purpose and function are the

exchange of ideas about substantive law, methods of teaching and administration of law schools with a view to the improvement of the quality of legal education. It operates both as a central point for such exchange and as a repository of information about legal education and engages in activities seeking to improve the quality of legal education. Its interest in this case rests on its perception of the issues raised as they affect the quality of legal education and the practicalities of operating an admissions policy in an era of limited spaces and increasing applications. For this reason, we leave the particular facts in this case to the briefs of the parties, and deal here with the general situation in legal education.

STATEMENT OF THE SITUATION IN LEGAL EDUCATION

Number of Applications

Last year there were 121,262 potential applicants to law school who took the LSAT. Of these, 106,970 registered in the Law School Data Assembly Service (LSDAS; the centralized transcript analysis service operated for the law schools by Educational Testing Service); 81,913 of these completed their LSDAS applications. This suggests that about 82,000 persons completed their applications to law school. Of these 82,000 applicants, probably over 70,000 would be considered qualified in terms of quantitative predictors of success in law school. 37,018 were enrolled in one of the ABA approved law schools. This suggests that there were nearly two qualified applicants for each available seat in law schools in the fall, 1973 entering class. As a result, for the first time in the history of United States legal education every accredited law school denied admission to applicants whom it considered qualified for the study of law.

Approved law schools are now receiving from five to over twenty times as many applications as they have spaces. The average number of schools to which a LSDAS registrant has reports sent was 4.06; this means that the 152 ABA approved law schools collectively processed nearly 350,000 applications for admission to the fall 1973 entering class. All approved law schools find themselves in the position of having a very large group of *qualified* applicants and selecting from them a smaller group of students. This unprecedented admissions situation presents a number of educational and public issues, of which the present case is one example. A detailed individual inventory of the strengths and weaknesses of each applicant for good performance in law school, much less in the practice of law, is simply not administratively possible for every applicant. Thus individual non-quantitative analysis tends to be reserved for portions of the total group of applicants.

The Quantitative Factors

All legal educators know that the quantitative measures can predict performance on law school examinations only on a crude level. This is particularly true because the LSAT was developed about 25 years ago for the purpose of selecting out at the bottom the applicants who were not qualified to do law school work. With the great increase in applicants in recent years, the problem has become entirely different. The law school admission officers today have to select from a group, all of whose members are well qualified. It is not known whether the Law School Admission Test has any real statistical ability to select accurately from among many applicants, all of whom have the minimum qualities. Law school admission officers have

long felt the need to take other factors into account in selecting from among applicants. To talk of quantitative predictions of "success" in the first year of law school or in law school for the three years (by which is meant grade average) is to discuss a range of probabilities of school "success." Correlations of combined LSAT and college grade averages with "success" in law school runs at about .20 to .70, with the average for 99 schools being .42 in the latest compilation of validities. This means, of course, that other factors are also playing an important role in "success" in law school (See Brief of Law School Admissions Council). Factors such as motivation and diligence on the part of the student, and the quality of instruction afforded by the faculty, are probably of equal importance to the quantitative measures.

To state categorically, therefore, that the higher the combined LSAT and college grade average is, the "better qualified" the applicant necessarily is even for law school "success," is clearly unwarranted, for this factor deals with rough probabilities and not certainties in individual cases.

To equate law school success with success in practice is also a dangerous proposition, for law school education, as it now exists, is best geared to training in the analytical and research skills required of practitioners. It does not, as yet, train adequately in the skills of advocacy, counselling, drafting, negotiation, client relations, fact investigation and preparation which are also of prime importance in practice. Nor do these skills involve the same aspects of intellectual capacity as the analytical skills. Capacity for these skills is not built into the LSAT, although other activities of the applicants may tend to predict the existence of capac-

ity for one or more of them. Nor does the LSAT score or college grade average pick up the factors of judgment, professionalism or ethics. The quantitative predictors, in view of the range of skills needed by a practitioner, are simply not good enough to be the sole basis for admission to law school. Most schools, therefore, use them somewhat as the University of Washington did—virtually automatic admission at the very top, virtually automatic rejection at the very bottom, with other factors operative in the middle.

Other Factors

The factors most commonly and traditionally used by law schools in admissions, in addition to the quantitative, are the appraisals of the applicant by his prior teachers, his extra-curricular record, the work or military experience of the applicant, the college he attended, his geographical residence and the status of the student or his family as alumni of the law school or university. Sex in some law schools was a discriminatory factor against women in the past, both in terms of complete exclusion and in terms of requirement for better credentials. It is not used to create preferential status for a female applicant, although for a short while in some schools there was such a preference. Minority race was an exclusionary factor in some schools in the past. In more recent years, it has operated to create a preferential status to some degree in almost all law schools as have residence, letters of recommendation, evaluation of the college of the applicant, "alumnus" status, and the like. As the number of blacks and members of other minority groups applying to law schools has increased and as applicants have reflected the opportunities for better preparatory

education opened to them by the decisions of this Court, the total number of black students presently admitted to law schools has increased to 7,601. Like the applicants at the University of Washington, they are qualified for success in law school without remedial work. Seventeen of the thirty-seven minority applicants admitted to the University of Washington held roughly as high or higher quantitative credentials as those of the plaintiff in this case. Twenty were somewhat lower, but still qualified.

Quality legal education, as this Court knows, involves discussion and understanding not only of the technical rules of law but also (1) the process by which law is created and applied at the administrative, legislative and judicial levels and (2) the functions law and particular laws serve in our society. Since an understanding of process and function necessarily involves an understanding of the value structures of a heterogenous society and a rounded perception of fact patterns and situations, it is obvious that exposure to differing values and differing fact perceptions is of great value in the educational process. The color of a man's skin in our society still leads to the kinds of prior experience which result in differing perceptions of fact, for we can perceive "fact" only through the lenses of our own prior experience and training. So, too, sex differences result in differential perceptions. These two categories, normally constitutionally suspect, are also categories whose use is essential to the creation of a law school class which can see and walk around and understand legal problems and solutions in the round. They are as important differential lens providers as poverty or wealth, urban, rural or small town, veteran or non-veteran, athlete or spectator or

any other factor which adds to the overall group consciousness and diversity of experience. We are a diverse society and our perception of legal problems and our production of solutions will be the better the more comprehensive our perception of the underlying facts becomes. This roundedness of perception can be most effectively done, except for the truly sensitive and empathetic person, by the presence in the classroom and school of different colors and sexes as well as different cultural and economic backgrounds. The presence of some minority students is, therefore, an asset in the legal education of all of the students. Recognition of this fact is one important reason for inclusion in law school of qualified minority students who, on quantitative measures, may be lower than white students.

The other important reason for assuring the presence of qualified minority students in law schools is that law schools are the sole points of entry to the bar in all but two states. Minority law consumers frequently are able to relate better to a member of their own race and are sometimes unwilling to confide in a member of another race and, therefore, do not utilize our legal system. However irrational some may perceive this minority to be in its attitudes, the attitudes are a fact of life which the legal structure of our country must face. Effective access to legal representation not only must exist in fact, it must also be perceived by the minority law consumer as existent so that recourse to law for the redress of grievance and the settlement of disputes becomes a realistic alternative to him. Communication with counsel is not only cognitive in nature; it also contains much which is affective. A woman talks to another woman differ-

ently and often communicates more than when she talks to a man, however trusted. The same is true of a black talking to a black, a Mexican-American talking to a Mexican-American and so on. Increasing the number of minority attorneys for these reasons is the other major factor in a law school decision to give consideration to the factor of race.

ARGUMENT

I. THE EQUAL PROTECTION CLAUSE DOES NOT REQUIRE THAT STATE LAW SCHOOL ADMISSIONS BE BASED SOLELY ON QUANTITATIVE PREDICTIONS OF SUCCESS IN THE FIRST YEAR OF LAW SCHOOL.

In all but constitutionally suspect categories this Court has traditionally recognized that few classifications by a state run afoul of the Equal Protection Clause (*Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61 (1911)), and has consistently refused to intrude in areas in which it should defer to the judgment of state authorities unless that judgment is clearly capricious. *Dandridge* v. *Williams*, 397 U.S. 471 (1970). When the state demonstrates a rational basis for the classification it has adopted, the Court's scrutiny under equal protection ends. For a state law school to decide that it will not base its admissions policy solely on LSAT scores and college grade averages is clearly rational and does not violate any standard of equal protection. Cf. *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973).

The quantitative admission predictions (LSAT scores and college grades) used by law schools are deficient in several respects as sole criteria for admission.

Charles E. Consalus, Program Director of the LSAT, writing in 1970 University of Toledo Law Review 513, states that:

> The standard error of measurement for the LSAT is 30 points either way from the "true" score. For example, an earned score of 500 (on a 200 to 800 scale), indicates that there are two chances out of three that the "true" score lies somewhere between 470 and 530. Or stated differently, there is one chance in three that the person's true ability as measured by the test, will actually fall outside this range.
>
> Another limitation concerns the imperfect ability of the LSAT to predict first year law school grades with precision. The coefficient of correlation between test scores and grades usually ranges from 0.30 to 0.50. This coefficient is an index for expressing the degree of relationship observed between two sets of measures for the same group. A −1.00 is a perfect negative correlation, zero indicates no correlation, and a +1.00 shows a perfect positive correlation. While the correlation coefficient for the LSAT may be considered low by some, it appears to be acceptable to the user schools which understand that it is extremely difficult to differentiate between individuals in a group of highly qualified, homogeneous applicants for admission. Furthermore, the LSAT has held up over the years as being about as good a single predicator of success as the undergraduate grade point average. The score and the grade point average combined are about half again as good a predicator as either alone.
>
> Finally there are variables which admit of no measurement at all by the test. A partial list would include persistence, originality, effective study habits, self-discipline, and motivation.

Perhaps of equal significance to law schools is the fact that the quantitative predictors, such as the LSAT or college grades, can not measure the applicant's ability to develop and use lawyer skills other than the analytical. They do not pretend to. They also do not measure the contribution an individual student makes to class discussion and participation in the legal education of his fellow students. The graduate of a law school on entry into the bar makes his contribution to the community to the extent he has developed the skills involved in litigation, negotiation, drafting, counselling clients, and understanding society, its problems and possibilities for legal solution or amelioration of those problems. A law school which seeks to graduate lawyers who will be useful to the community in which they work must of necessity have a wider range of criteria for admission than the quantative predictors.

II. THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT IS NOT VIOLATED BY A STATE LAW SCHOOL DECISION TO USE FACTORS, INCLUDING RACE, IN ADDITION TO QUANTITATIVE PREDICTORS IN ITS SELECTION OF STUDENTS.

A. The Use of Race as a Factor in Law School Admission Is Constitutionally Permissible Because of the State Interest in Quality Legal Education and the Opening of Access to the Bar for Minority Groups.

To understand what this case is it is necessary to understand what it is not. This case does not involve a plaintiff who because of race has been severely limited, perhaps entirely foreclosed, from entering and using a state owned or supported institution. This, then, is not *Brown* v. *Board of Education of Topeka,* 347 U.S. 483 (1954) or *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961); nor is it *McLaurin* v. *Oklahoma State Regents for Higher Education,* 339

U.S. 637 (1950). The University of Washington did not establish quotas for racial minority groups, however constitutional such quotas may be. *Swann* v. *Charlotte-Mecklenburg Bd. of Education,* 402 U.S. 1, 16 (1971). The law School's admission purposes do not relate to maintenance of racial supremacy; *Loving* v. *Virginia,* 388 U.S. 1 (1967). The factual situations in *Hirabayashi* v. *U.S.,* 320 U.S. 81 (1943) and *Shelley* v. *Kraemer,* 334 U.S. 1 (1948) bear no relationship to the present case.

This case does involve a plaintiff who contends that equal protection forbids a law school to use race as one of a number of criteria, both objective and subjective, in evaluating which qualified applicants, of many, shall be admitted to the school's first year. Plaintiff makes this argument in the context of an entering freshman law class approximately three quarters of which are members of his own race. The other quarter of this class is of mixed racial complexion. Some of the students in that quarter of the class have higher or roughly equal quantitative analytic predictors to those of plaintiff. About twenty, although still qualified on the quantitative measures, have lower ones. The case is one where race was used in conjunction with other relevant factors to make the final decision to admit or not admit. It is permissible to use race in conjunction with other relevant factors in fulfillment of appropriate state objectives; the *Swann* case, *supra,* and *Porcelli* v. *Titus,* 431 F.2d 1254, 1257 (3d Cir. 1970) ("State action based partly on considerations of color, when color is not used per se, and in furtherance of a proper governmental objective is not necessarily a violation of the Fourteenth Amendment."); *certiorari denied,* 402 U.S. 944 (1971), exemplify this.

However, whether the admission policy of the Law School of the State of Washington must be justified by the test of "compelling" interest or simply by the test of rational basis, we submit that the interest of a state law school in using race as a factor in admission to law school is constitutionally permissible.

It should not be constitutionally impermissible for a state law school to make a serious effort to achieve diversity in its student body. The quality of legal education parallels student understanding of the ways in which law relates to society. Student perception of legal situations is conditioned by the prior experience, training, background, culture, race and sex of the student body members. A white student from a "good" undergraduate school, amply funded by a well-to-do-family, views law and society differently from the way a black student would with a similar, or different, background. The sex of a student, his or her work experience or lack of it, and the area of the country in which he was raised will provide a variety of backgrounds against which the individual law students will perceive law and the role of lawyers in society.

Law students still "live" law; we ask the Court to give judicial notice to this unique and important facet of how law students teach themselves in the context of their law school world. This was a significant part of the basis for this Court's decision in one of the leading cases involving legal education. *Sweatt* v. *Painter,* 339 U.S. 629, 634-635 (1950). In the diverse society we enjoy, law schools consider it vital for future lawyers to experience as broad a variety of perceptions as is possible in their discussion of legal problems and their solutions. It is for this reason

that law schools seek information concerning race, sex, residence, work experience and the like from applicants. It is also for this reason that law school admission officers and committees evaluate and act upon such information in making admission decisions.

Diversity in the law school student body achieves another important interest for state law schools. Law schools serve as the source of training of a bar which must satisfy the legal needs of a heterogenous society. The law student becomes a lawyer, but a lawyer who continues to be black or white, male or female and a lawyer still knowledgeable about the background of his past. These characteristics and this knowledge enable the lawyer to communicate effectively with particular kinds of law consumers having the same race, sex or background. Differences of race or sex can interfere with meaningful communication. Minority groups in our society need to be given the opportunity to be represented by persons they believe understand and relate to them—with whom they can communicate on all levels—affective as well as cognitive. The appearance of justice generated by the opportunity for such representation may be almost as important to our society as justice itself. It helps the orderly solution of disputes by legal means.

The 1967 Report of the Advisory Committee for the Minority Groups Study, 1967 *Proceedings* of the Association of American Law Schools, Part One, Section I, 160, indicates that approximately one percent of the members of the legal profession are black, although approximately eleven to twelve percent of the population of our country is black. It would appear, therefore, that some effort on the part of law schools to seek out qualified minority students is justifiable to assure

minority law consumers a sufficient number of lawyers to whom they can relate and with whom they can communicate.

The creation of such an opportunity by admission to law schools of applicants selected in part by race reaches the stature of a compelling state interest in the training of an adequate number of minority lawyers and would justify even the imposition of a quota system.

B. The Equal Protection Clause Should Not Be Used as a Constitutional Vehicle for Courts To Review the Credentials of Rejected Law School Applicants When the Result Would Be Massive Judicial Intervention Into the Complex and Difficult Admission Policies, Procedures and Judgments of the Nation's Public Law Schools.

Approximately 82,000 persons applied to the 152 schools accredited by the ABA in 1973. Those schools admitted, collectively, an entering first year class of 37,018. The University of Washington Law School received 1,601 applications for admission to its first year class beginning September, 1971. The number of available positions in that class were between 145 and 150. The admission policies and procedures for selection among the 1,601 applications to achieve a first year class which effectuates the purposes and interests of the school are described in the case below. These admission procedures are relatively typical in the law school world. The Supreme Court of Washington, in this case, described the task of selection as difficult, time consuming and requiring the exercise of careful and informed discretion.

Law schools differ greatly in their admission policies. Almost all law schools seek to have a reasonable

representation of minority students. The University of Washington Law School thought 37 ~~students~~ out of ~~145~~ 330 was reasonable. The result in other law schools ranges between about five or ten percent of their students.

Unless this Court holds that public law schools can constitutionally meet their duties to provide quality legal education and to provide lawyers to meet law consumer needs, by insisting upon broad representation in their student bodies of the various groups which make up our society, the problem of judicial enforcement of the Equal Protection Clause must be faced.

The problem exemplified in *Swann* v. *Charlotte-Mecklenburg Board of Education, supra,* heavily involves the nation's courts in the operation of the nation's school affairs. This is justifiable because the Constitution requires the involvement. It does not follow that *Swann* should be equated with the present case. There is no similar clear-cut discrimination here. It is fair therefore, to look at the impact of the legal process on the University of Washington Law School in the present case, described in Anderson, *The Admissions Process in Litigation,* 15 Arizona Law Review 81, 86-115 (1973). It was very severe.

The burden on courts, if court review be required, is obvious, in view of the extraordinary number of law school applicants. Pressure by courts is also very likely to lead to adoption, by the public law schools, of delusively accurate, purely numerical standards to choose entering first year classes with corresponding danger to quality legal education and the availability of the legal system to minority law consumers.

Traditionally, law school admissions policies and procedures have been conceived and maintained by the law schools. Caution should be exercised by the Court in fashioning a new equal protection role for the nation's courts and law schools, in determining the interests admission policies should serve and in evaluating individual applications which have been approved or rejected.

The better road is to continue to leave admissions policy to the sound discretion of individual law schools. The only other way of relieving the courts of the burden of reviewing an individual applicant's credentials would be to mandate as a constitutional requirement the use of quantitative predictors as the sole criterion for admissions, despite the fact that they have limited statistical validity at best, and do not measure at all many of the qualities which are relevant for admission to law school.

CONCLUSION

This Court should not impose a constitutional requirement which would force state law schools to use only quantitative measures in the selection of students for admission to law school. Other factors, including race, should meet constitutional requirements, when properly utilized as a part of an over-all admissions system. Any other decision would create a danger of lessening the quality of legal education for all students and would have a deleterious effect on the provision of legal representation perceived as effective by minority law consumers. The determination and maintenance of an admissions policy adequate to prevent these risks should be left to the discretion of the individual law schools which are already supervised by

the American Bar Association and the Association of American Law Schools. See Section 501, Approval of Law Schools, American Bar Association, Standards and Rules of Procedure; Article 6, Association of American Law Schools Bylaws.

The judgment below should be affirmed.

Respectfully submitted,

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February 1, 1974